

Jacqueline T. Lenmark, Esq.  
**Keller, Reynolds, Drake,  
Johnson & Gillespie, P.C.**  
50 South Last Chance Gulch, Suite 4  
P.O. Box 598  
Helena, MT 59624  
Telephone: (406) 442-0230

Stanley T. Kaleczyc, Esq.  
**Browning, Kaleczyc, Berry & Hoven, P.C.**  
P.O. Box 1697  
Helena, MT 59624  
Telephone: (406) 443-6820

Helen E. Witt (Admitted pro hac vice)  
**Kirkland & Ellis LLP**  
300 North LaSalle Street  
Chicago, Illinois 60654  
Telephone: (312) 862-2000

*Attorneys for Applicant  
Health Care Service Corporation*

**BEFORE THE COMMISSIONER OF SECURITIES AND INSURANCE  
OFFICE OF THE STATE AUDITOR  
STATE OF MONTANA**

IN THE MATTER OF  
THE CONVERSION OF BLUE CROSS AND  
BLUE SHIELD OF MONTANA, INC. AND  
THE ALLIANCE WITH HEALTH CARE  
SERVICE CORPORATION,

Applicants.

Case No. INS-2012-238

**APPLICANT HEALTH CARE SERVICE  
CORPORATION'S OPPOSITION TO  
MOTION TO DETERMINE  
CONFIDENTIALITY AND UNSEAL  
RECORD**

The Office of the Commissioner of Securities and Insurance, Montana State Auditor ("CSI") contends that it is "of vital importance to Montanans" to know how much Applicant Health Care Service Corporation ("HCSC") has paid ten of its senior executives in the last few

**APPLICANT HEALTH CARE SERVICE CORPORATION'S  
OPPOSITION TO MOTION TO DETERMINE CONFIDENTIALITY  
AND UNSEAL RECORD**

years because those figures are “indicative of HCSC’s overriding business philosophy.” (CSI Brief at 9, 8.) CSI’s arguments are untenable, for multiple reasons. First, with the exception of HCSC’s Chief Executive Officer, HCSC employees have a reasonable expectation of privacy in their compensation information under the Montana Constitution notwithstanding the fact that the information can theoretically become public in Illinois. CSI did not obtain the information from a public source; it compelled HCSC to produce it. The information is not disclosed within HCSC beyond those with a business need to know and even the Chief Operating Officer of HCSC does not know the specifics of others’ compensation. (*See e.g.* CSI Brief, Ex. 2 at 66:18-22.) The press articles CSI cites all focus on the compensation of the CEO. Under these circumstances, the information should be considered private.

Second, the compensation data is of no relevance to the factors required to be considered by CSI or the Attorney General under the Conversion Statute. And none of the arguments CSI offers in favor of its relevance supports disclosure of anything other than the dollar numbers; the names of the individuals are of no import to CSI’s stated intended use of the information.

Finally, the arguments CSI presents in support of Montanans’ alleged need to know should be rejected, as the record is devoid of any testimony or other evidence that would allow conclusions to be reached based on anything but rank speculation. For example, CSI contends that disclosure of specific executive compensation on a person-by-person basis “would assist Montanans in determining whether HCSC expends premium dollars it receives consistent with a true not-for-profit corporate philosophy.” (*Id.* at 8.) But CSI presented no expert or other evidence about what a “true not-for-profit corporate philosophy” is. Similarly, there is no evidence in the record tying HCSC’s executive compensation levels to premium or benefit changes. The record in this matter is closed, and CSI did not present evidence sufficient to tie

executive compensation to any relevant factor. CSI should not be permitted to override the interests of individual privacy with speculative assertions about what the data might—but has not been demonstrated to—show.

For all of these reasons, as more fully set out below, CSI's Motion to Determine Confidentiality and Unseal Record should be DENIED.

**A. HCSC's Employees Have A Reasonable Expectation Of Privacy In Their Personal Compensation Information.**

"Montana's treatment of privacy rights is more strict than that offered by the Federal Constitution." *State v. Nelson*, 283 Mont. 231, 239-40, 941 P.2d 441, 447 (1997). Included in the protected privacy rights is "informational privacy." *Id.* at 241, 941 P.2d at 448. This prong of the privacy protection includes personnel records, as well as personal financial information. *State v. Burns*, 253 Mont. 37, 40, 830 P.2d 1318 (1992); *Dunlap v. Graves*, 2004 ML 4068, at \*56, 2004 Mont. Dist. LEXIS 3240 (2004).

CSI argues that HCSC's employees have no protected privacy interest in the compensation data because HCSC includes it, as it must, in its annual statements to the Illinois Department of Insurance ("IDOI"). This, CSI contends, constitutes "public disclosure," because an IDOI affiant states that the document "may be freely accessed and disseminated to the public." (CSI Brief at 5; CSI Ex. 3 at ¶ 6.) But CSI stops short of stating that the compensation document has, in fact, been publically disclosed. It does not even state that CSI has obtained a copy other than through discovery in this action.

In fact, the document at issue may not be "freely accessed," but is available from the IDOI only through an Illinois Freedom of Information Act request. *See* 5 ILCS 140/1 *et. seq.* *See also* <http://insurance.illinois.gov/Main/foia.asp> (last visited April 2, 2013) (providing instructions for submitting a FOIA request to the IDOI.) As the press articles CSI references

show, there has been remarkably little public reporting of the compensation information except for that of the CEO, Patricia Hemingway Hall. Only Ms. Hemingway Hall is mentioned by name in all but one of the articles CSI references.<sup>1</sup> As a result of the sensitivity shown by the press and lack of actual public disclosure, HCSC executives, other than Ms. Hemingway Hall, do in fact have a reasonable expectation of privacy.

HCSC is willing to stipulate to Ms. Hemingway Hall's compensation as reflected on Exhibit D. HCSC would also stipulate to the other compensation numbers on Exhibit D, including the total. The names and identifying information for the other nine employees listed on the Exhibit should be masked, however, as the identities of the employees are of no relevance to any of CSI's arguments; Montanans have no right to know at this personal-detail level. This compromise would protect both the non-party employees' privacy interests and any legitimate needs of CSI and the public. Such an approach has been approved by Montana courts under similar circumstances. *See, e.g. T.L.S. v. Montana Advocacy Program*, 2006 MT 262, ¶s 25-32, 334 Mont. 146, 144 P.3d 818 (privacy rights in public documents protected while still allowing disclosure of relevant public information under Article II by redacting names and other identifying information); *Yellowstone County v. Billings Gazette*, 2006 MT 218, ¶ 25, 333 Mont. 390, 143 P.3d 135 (privacy interests of non-parties can be protected by redacting individuals' names while still allowing disclosure of relevant public information).

---

<sup>1</sup> The March 15, 2010 Crain's article CSI cites references the 2008 and 2009 compensation of five HCSC executives, four of whom are no longer with HCSC. These four former employees are not among the employees whose compensation is listed on CSI Exhibit D.

HCSC respectfully requests that to the extent Exhibit D is deemed to include non-private information requiring it to be unsealed, that the names and titles of the nine employees other than Ms. Hemingway Hall be redacted.<sup>2</sup>

**B. HCSC Compensation Data Is Not Relevant To Any Factor Under The  
Conversion Statute.**

The constitutional right of the public to examine documents and observe deliberation of agencies of state government is not absolute; the right to know and the privacy rights of individuals must be balanced. The Supreme Court has made clear that the required balancing must be done “in the context of the facts of each case, to determine whether the demands of individual privacy clearly exceed the merits of public disclosure.” *Missoulian v. Board of Regents*, 207 Mont. 513, 529, 675 P.2d 962, 971 (1984). A precise determination of “what interests are at stake,” must be made to inform the balancing of interests. *Id.*

The issues in this proceeding are determined by Montana Code Annotated §§ 35-2-609, 35-2-617 and Title 50, Chapter 4, part 7 (“Conversion Statute”). The Conversion Statute sets out with precision the criteria to be considered on an application for approval. *See* Montana Code Annotated §§ 50-4-715 and 50-4-717. But CSI does not mention the Conversion Statute at all in its brief. It argues that Montanans have a “strong interest” in learning the details of HCSC’s approach to executive compensation, but does not explain how or why that “interest” translates into a right to know the specifics of the compensation of identified HCSC employees.<sup>3</sup> Without some connection to the criteria outlined in the Conversion Statute, the privacy rights in the HCSC compensation data far outweigh any “right to know.” Under these circumstances and the

---

<sup>2</sup> The transcript pages CSI seeks to unseal should likewise be redacted to mask the specific compensation numbers of the witness and to maintain under seal non-compensation information that is independently worthy of confidential treatment.

<sup>3</sup> HCSC objected to the relevance of Exhibit D at the hearing. The evidence was admitted based on the condition that CSI “keep it brief.” (CSI Brief, Ex. 2 at p. 59:17-60:15.)

facts of this case, the balancing test prescribed in *Board of Regents* compels continued protection of the personal compensation information.

**C. CSI Failed To Offer Any Evidence Or Expert Opinion That Supports The Speculative Arguments For Relevance It Offers.**

CSI's final argument is that the compensation information should be made public to "assist Montanans in determining whether HCSC expends premium dollars it receives consistent with a true not-for-profit corporate philosophy." (CSI Brief at 8.) It is clear from the rhetoric in the next paragraph that CSI intends to urge that HCSC does not act like a "true" not-for-profit company. In that paragraph, CSI sensationalizes the compensation information by accusing HCSC of "valuing" its key employees "more highly than BCBSMT's entire core business." (*Id.*) But the problem with these arguments is that CSI did not offer any evidence or expert opinions that would ground them in fact, rather than simplistic speculation. CSI did not offer any expert opinions, or testimony of its own, and did not cross-examine any of HCSC's witnesses, about what a "true" not-for-profit philosophy is. It offered no evidence of how HCSC's compensation structure is inconsistent with such a philosophy. No compensation expert was offered and no comparison of compensation levels at other "more true" non-profit companies was presented. CSI should not be allowed to invite the public to reach conclusions that were not supported by a thread of evidence at the hearing.

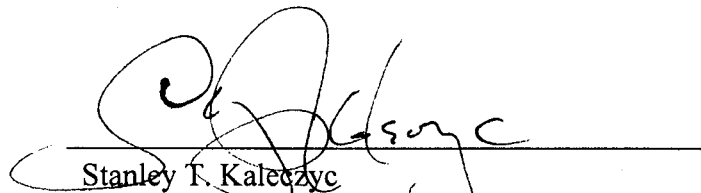
Similarly, the implicit suggestion that executive compensation levels have had an adverse effect on benefit or premium levels is without evidentiary support in the record. The total compensation of HCSC's ten most highly paid executives is a tiny fraction of HCSC's total annual revenue of \$19.9 billion, as reported on a statutory basis. (*See M. Smith Direct Testimony, p. 4.*) In addition, the testimony of CSI's own expert confirmed that HCSC's previous alliances with other Blue Cross and Blue Shield Plans "did not result in significant price

increases.” (T. Tardiff Direct Testimony, pp. 20-21). These facts demonstrate that there is no evidence of any impact on premium rates or benefit levels justifying release of the compensation data.

### CONCLUSION

For these reasons, HCSC requests that CSI’s Exhibit D and the testimony about it be deemed confidential and CSI’s Motion to Unseal be ~~DENIED~~.

Dated: April 4, 2013



Stanley T. Kaleczyc  
Browning, Kaleczyc, Berry & Hoven, P.C.  
P.O. Box 1697  
Helena, MT 59624  
Telephone: (406) 443-6820

Jacqueline T. Lenmark, Esq.  
Keller, Reynolds, Drake,  
Johnson & Gillespie, P.C.  
50 South Last Chance Gulch, Suite 4  
P.O. Box 598  
Helena, MT 59624  
Telephone: (406) 442-0230

Helen E. Witt, P.C.  
Kirkland & Ellis LLP  
300 N. LaSalle  
Chicago, Illinois 60654  
Telephone: (312) 862-2000  
Facsimile: (312) 862-2200

*Attorneys for Applicant Health Care Service  
Corporation, an Illinois Mutual Legal Reserve  
Company*

**CERTIFICATE OF SERVICE**

I, Amber G. Carlson, BROWNING, KALECZYC, BERRY & HOVEN, P.C., certify that on April 4, 2013, I served a true and correct copy of the foregoing **APPLICANT HEALTH CARE SERVICE CORPORATION'S OPPOSITION TO MOTION TO DETERMINE CONFIDENTIALITY AND UNSEAL RECORD**, by e-mail and by mailing it first class postage prepaid to:

Ms. Sybil Shults (Hand Delivered)  
Office of the Commissioner of Securities &  
Insurance  
State Auditor's Office  
840 Helena Avenue  
Helena, MT 59601

Honorable W. William Leaphart  
1772 University Avenue  
Helena, MT 59601

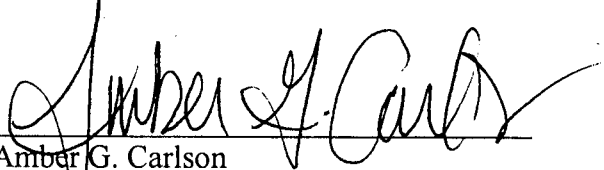
Jesse Laslovich, Esq.  
Nick Mazanec, Esq.  
Office of the Commissioner of Securities &  
Insurance  
State Auditor's Office  
840 Helena Avenue  
Helena, MT 59601

Kelley Hubbard, Esq.  
Michael Black, Esq.  
Montana Department of Justice  
215 North Sanders, Third Floor  
P.O. Box 201401  
Helena, MT 59620-1401

Jay Angoff, Esq.  
Mehri & Skalet, PLLC  
1250 Connecticut Avenue NW, Suite 300  
Washington, DC 20036  
*Pro hac vice for CSI*

Michael McMahon  
McMahon, Wall & Hubley, PLLC  
212 N. Rodney  
Helena, MT 59601

DATED this 4th day of April, 2013

  
Amber G. Carlson

**APPLICANT HEALTH CARE SERVICE CORPORATION'S  
OPPOSITION TO MOTION TO DETERMINE CONFIDENTIALITY  
AND UNSEAL RECORD**